LIBRARY
SUPREME COURT, U. S.

Supreme Court, U.S.
FILED
OCT 8 1971
ROBERT SEAVER, CLERK

IN THE

Supreme Court of the United States

October Term, 1971

No. 71-508

RALPH J. HENNING,
Petitioner

v.

UNITED STATES OF AMERICA,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

JEROME R. VERLIN
Suite 700
121 South Broad Street
Philadelphia, Pa. 19107
Counsel for Petitioner

October 6, 1971

THE LEGAL INTELLIGENCER, 99 NORTH JUNIPER STREET, PHILA., PA. 19107

INDEX

Page

Opinion Below 1

Jurisdiction 2

Questions Presented 2

Statutory Provisions Involved 2

Statement of the Case 3

Reasons for Granting the Writ 5

I. The decision below extends the "*Feres* Doctrine" to inherently post-discharge claims, in which considerations of maintaining military discipline do not dictate an implied exception to the Tort Claims Act 5

II. The instant case clearly illustrates the need for this Court to declare unequivocally that the "*Feres* Doctrine" is not based on an analogy to workmen's compensation "exclusivity" 9

III. The decision below conflicts with *United States v. Brown*, 348 U.S. 110 (1954), by denying recovery on the ground that the otherwise actionable negligence had "arisen" from earlier in-service negligence 10

Conclusion 12

Appendix 13

Opinion and Judgments of the Court of Appeals . 13

Opinion and Order of the District Court 21

Amended Order of the District Court 24

TABLE OF CITATIONS

Cases: Page

Brooks v. United States, 337 U.S. 49 (1949) 5

Feres v. United States, 340 U.S. 135 (1950) .5, 6, 7, 8, 9, 11

Johansen v. United States, 359 U.S. 427 (1952) 9, 10

Schwartz v. United States, 230 F. Supp. 536 (E.D. Pa. 1964) 11

United States v. Brown, 348 U.S. 110 (1954) ... 6, 8, 9, 10, 11, 12

United States v. Muniz, 374 U.S. 150 (1963) 5, 9

United States v. Reid, 251 F.2d 691 (5th Cir.1958) 7

Statutes:

Federal Tort Claims Act, 28 U.S.C. §1346(b), §2674 ... 5

Id., §2680(i) 8

Rule:

Federal Rule of Civil Procedure 54(b) 3

IN THE

Supreme Court of the United States

October Term, 1971

No. ——

RALPH J. HENNING,

Petitioner

v.

UNITED STATES OF AMERICA,

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioner, Ralph J. Henning, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Third Circuit entered in this proceeding on July 13, 1971.

OPINION BELOW

The opinion of the Court of Appeals, not yet reported, appears in the Appendix hereto. The Memorandum Order,

Order, and Amended Order of the District Court, not reported, likewise appear in the Appendix.

JURISDICTION

The judgment of the Court of Appeals for the Third Circuit was entered on July 13, 1971, and this petition for a writ of certiorari is filed within ninety days of that date. This Court's jurisdiction is invoked under 28 U.S.C.§ 1254(1).

QUESTIONS PRESENTED

1. Is a veteran's claim for post-service injury suffered in reliance upon negligent medical advice on discharge impliedly excepted from the Federal Tort Claims Act on the ground that such a claim would undermine military discipline?

2. Is such a claim impliedly excepted from the Tort Claims Act because of the veteran's eligibility for and receipt of administrative compensation?

3. Is such a claim barred where the negligent discharge advice probably flowed from the misreading of an in-service x-ray, even though a claim for negligent medical advice on discharge is inherently one which could not be possessed by an active serviceman?

STATUTORY PROVISIONS INVOLVED

FEDERAL TORT CLAIMS ACT, TITLE 28 UNITED STATES CODE, SECTIONS 1346 (b) AND 2674

§ 1346. United States as defendant.

* * * * *

(b) Subject to the provisions of chapter 171 of this title, the district courts, together with the United States

District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

§2674. Liability of United States

The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages.

* * * * *

STATEMENT OF THE CASE

Petitioner, Ralph J. Henning, brought this action under the Federal Tort Claims Act (FTCA) to recover damages for aggravation of pulmonary tuberculosis during the period following his discharge from the Army, when, in reliance upon erroneous medical advice given him on discharge, he failed to obtain medical treatment.[1]

---

1. Not involved in this Petition is Henning's other claim that after the discovery of his tubercular condition, the Veterans' Administration negligently delayed offering him treatment. That claim is presently pending in the District Court, having been expressly excepted from the partial summary judgment granted in favor of the government with respect to the claim involved here. The partial summary judgment conforms with FRCP 54(b).

Prior to Henning's induction into the United States Army on November 15, 1961, he was in a state of good health, which was reflected in his pre-induction physical examination (10a). During his period of active service at Seneca Army Depot, Romulus, New York, Henning contracted pulmonary tuberculosis (11a). This condition was revealed by chest x-rays taken in connection with his discharge physical, but Henning was never informed of the results of such x-rays (11a).

Upon his discharge on November 14, 1963, Henning was given a report entitled "Physical and Mental Status on Release from Active Service," which report, under the heading "Physical Status," stated that in the absence of "new disease or injury" while a civilian, he was physically qualified for re-enlistment within a six month period without medical re-examination (11a, 27a).

Henning had a mild cough at the time of discharge, which persisted. He, therefore, consulted a physician, who, upon taking a history of Henning's recent discharge physical, including chest x-rays, ruled out tuberculosis and diagnosed his cough as stemming from a sinus condition (15a). In June, 1964, some seven months following his discharge from the service, Henning developed seriously painful symptoms and his substantially worsened tubercular condition was diagnosed by the Media Clinic (12a). In the histories taken by both the Media Clinic and Riddle Memorial Hospital in June, 1964, it is noted that Henning had been given a discharge physical, including chest x-rays, in the fall of 1963, and that no reference had been made to any pathology (28a, 30a).

REASONS FOR GRANTING THE WRIT

I. The decision below extends the "*Feres* Doctrine" to inherently post-discharge claims, in which considerations of maintaining military discipline do not dictate an implied exception to the Tort Claims Act

Among the initial questions reaching this Court after the enactment of the Federal Tort Claims Act (FTCA) was its applicability to servicemen. In *Brooks v. United States*, 337 U.S. 49 (1949), this Court held that the general waiver of sovereign immunity embodied in the FTCA did extend to claims of servicemen, as well as to claims of other individuals against the United States. In *Brooks*, this Court declared "it would be *absurd* to believe that Congress did not have the servicemen in mind in 1946, when this statute was passed." *Id.* at 51 (emphasis added). In reaching this decision, the Court recognized "dire consequences" to military discipline envisaged by the government if *all* conceivable servicemen's claims were allowed. See *id.* at 52. Thus, the possibility of an implied exception, covering such cases as "a battle commander's poor judgment, an army surgeon's slip of hand, a defective jeep which causes injury," *ibid.*, was intentionally left open in *Brooks*.

Feres v. United States, 340 U.S. 135 (1950), decided three cases linked by the "common fact" that "each claimant, *while on active duty* and not on furlough, *sustained injury* due to negligence of others in the armed forces." *Id.* at 138 (emphasis added). Thus, the implied exception to the FTCA recognized in *Feres* was the same implied exception envisioned the preceding year in *Brooks*—military discipline would be undermined by claims for injuries sustained while on active duty. See also *United States v. Muniz*, 374 U.S. 150, 162 (1963), declaring that "in the last analysis," *Feres* is "best explained" by

> . . . 'the peculiar and special relationship of the soldier to his superiors, the effect of the maintenance of such suits on discipline, and the extreme results that might obtain if suits under the Tort Claims Act were allowed for negligent orders given or negligent acts committed in the course of military duty.' *United States vs. Brown*, 348 U.S. 110, 112.

The question posed by this petition is how far this implied exception to the FTCA, grounded in military discipline, extends. The instant factual situation lies between that in the *Feres* cases, in which recovery was denied, and that in the only subsequent Supreme Court case, *United States v. Brown*, 348 U.S. 110 (1954), allowing recovery. Allowing recovery in each instance in *Feres* would have permitted any soldier injured from defective barracks maintenance or medical corps malpractice to sue, in effect, his military superiors, which would weaken the authority of the military chain of command. No such considerations existed in *Brown*, where post-service malpractice was performed upon an old army injury. The Court might have held in *Brown*, as the dissent would have done, that the claim was barred because it arose, in a sense, out of military service, but the claim was allowed. The essential difference between *Feres* and *Brown* is that army discipline is not disrupted by claims which come into being after the claimants' military careers have ended.

Henning contracted tuberculosis while in the army, but was nevertheless given written advice on discharge that his health on the discharge date was such that he could reenlist within six months without re-examination, provided he did not incur new diseases while a civilian (see 27a). Unlike the *Feres* situations, neither the negligent act nor the injury here occurred *during* active service. The negligent act (the misleading advice) occurred at the point of discharge, and the injury (worsening of Henning's condition in reliance thereon) was suffered *thereafter*, while he was a

civilian. Henning's claim is thus not one of the types of claims linked by the "common fact" that the claimants "*while on active duty* and not on furlough *sustained injury* due to negligence of others in the armed forces." See *Feres v. United States*, supra, 340 U.S. at 138 (emphasis added).

Beyond the absence of such a "common fact" here is the further absence here of any psychological element in Henning's claim which might disrupt the authority of the military over a soldier. Although it would be unwise to draw a subjective distinction between soldiers who know and those who do not know that they were injured while still in active service (the *Jefferson* case in *Feres*), Henning's is not a "*Jefferson*" claim. As the Court of Appeals for the Fifth Circuit clearly explained in *United States v. Reid*, 251 F.2d 691 (5th Cir. 1958), the mis-reading of a positive tuberculosis x-ray itself is not an actionable tort. The injury, which creates the cause for complaint, is the exacerbation of the disease suffered in reliance on the misleading *report* which the victim receives of that x-ray. *Ibid.* Thus, not merely Henning, but *any* recipient of such misleading advice is not only unaware of an actionable claim, but in fact *does not have* an actionable claim until "some time" (*Id.* at 695) *after* receiving the misleading advice. The absence of any actionable claim here while Henning was still in the army thus distinguishes his case from that of the *Jefferson* claimant in *Feres*, who was seized (but for the *Feres* rule) of an actionable negligence claim the moment he was sewn up with an army towel in his abdomen, necessitating, sooner or later, additional surgery.

The government's "statement of the issue presented" here in its Third Circuit brief as a case in which "the negligent act occurs while plaintiff is in the service but plaintiff does not discover his injury until after he has been discharged," Appellee's Brief, p. 1, attempts to require petitioner to ask this Court to draw the subjective and uncertain line which this Court wisely refused to draw in *Jefferson*. The line which should be drawn by this Court, upon con-

siderations of military discipline, is the clear and objective line between claims which do and do not exist while the claimant remains in active service. The implied exception to the FTCA, which the exigencies of military discipline necessitated "despite literal language [in the Act] and other considerations to the contrary," see *Brooks v. United States*, supra, 337 U.S. at 52, can and should stop where the claim inherently ceases to be one which *could* be possessed by an active serviceman. Manifestly, a claim based on post-service reliance on misleading advice on discharge could not be possessed by an active soldier.

It is true that at trial here "military negligence" will be in issue, but the military is not immune from having to defend the manner in which its personnel act toward civilians. It is not even immune from having to defend its personnel's conduct toward *active soldiers on leave: Brooks v. United States*, supra. All that the military is immune from under this implied exception to the FTCA is from having to defend its personnel's conduct toward active soldiers injured while on active duty. *Feres v. United States*, supra. It is the "peculiar and special relationship" between the *parties*, see *United States v. Brown*, supra, 348 U.S. at 112, not any immunity of military activities (which are immunized expressly, where necessary[2]) which justifies and delimits the implied exception involved here.

The instant decision leaves the boundaries of the implied exception to the Tort Claims Act vague and uncertain, and extends them beyond their essential purpose, and should be reviewed.

---

2. See 28 U.S.C. §2680(j), expressly excepting from the Tort Claims Act "any claim arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war."

II. The instant case clearly illustrates the need for this Court to declare unequivocally that the *Feres* Doctrine is not based on an analogy to workmen's compensation "exclusivity"

The instant parties' respective arguments, both of which cited expressions of Your Honorable Court, clearly illustrate the need for this Court to define the basis of *Feres* definitively.

Henning's claim for post-service reliance upon misleading medical advice on discharge did not come into being while he was in active service. Petitioner, therefore, stressed in his arguments below that *Feres* should not be extended to apply to his case because military discipline and the "peculiar and special relationship of the *soldier* to his superiors," see *Muniz*, supra, 374 U.S. at 162 (emphasis added), would not be prejudiced by allowing this suit.

Throughout this litigation, however, the government has consistently advanced an additional basis for applying *Feres*—Henning's eligibility for and receipt of administrative compensation. See, *e.g.*, Defendant's Motion for Summary Judgment, pars. 2 through 5, and 9, and exhibits A-D thereto (40a-53a); Defendant's Memorandum Contra Plaintiff's Motion for Summary Judgment and in Support of Defendant's Motion for Summary Judgment, p. 2; and Appellee's Brief to the Court of Appeals, pp. 5-6.

From the very beginning of Tort Claims Act litigation, this Court has consistently declared that Veterans' Administration compensation has no bearing upon the right to sue, but only on the amount of recovery. See *Brooks v. United States*, supra, 337 U.S. at 53; *United States v. Brown*, supra, 348 U.S. at 110 and n*. In particular, *Johansen v. United States*, 359 U.S. 427 (1952), which the government cited as "analogous" on page 6 of its Third Circuit brief, was *expressly distinguished* in *United States v. Brown*, supra, where this Court declared:

> "Congress could, of course, make the compensation system the exclusive remedy. The Court held in *Johansen v. United States*, 343 U.S. 427, that Congress had done so in the case of the Federal Employees Compensation Act, with the result that a civilian employee could not sue the United States under the Public Vessels Act. We noted in the *Brooks* case, 337 U.S. 49, 53, that the usual workmen's compensation statute was in this respect different from those governing veterans, that Congress had given no indication that it made the right to compensation the veteran's exclusive remedy, that the receipt of disability payments under the Veterans Act was not an election of remedies and did not preclude recovery under the Tort Claims Act but only reduced the amount of any judgment under the latter Act. We adhere to that result. . . ." 348 U.S. at 113.

Workmen's Compensation analogies thus have no place in determining the applicability of the *Feres* doctrine to particular Tort Claims Act suits. The granting of certiorari is necessary to reiterate this point and to foreclosure continued assertion of the *Johansen* analogy by the respondent, which is the exclusive defender of all Tort Claims Act suits.

III. The decision below conflicts with *United States v. Brown* by denying recovery on the ground that the otherwise actionable negligence had "arisen" from earlier in-service negligence

The Court of Appeals viewed the instant record as presenting four distinct claims (Opinion below, p. 4). The denial of recovery upon the first two of those claims (*id.* at 5-7) is conceded by petitioner to have correctly applied *Feres*. The third claim—failure to advise Henning of his tubercular condition after discharge—would present the

issue on certiorari whether "continuing" negligence which began during active service loses its non-actionability after discharge. If, as the Court below held, "this seems beyond the contemplation of the Federal Tort Claims Act as interpreted by *Feres*," *id.* at 8, the moving consideration would no longer be "the peculiar and special relationship of the soldier to his superiors" itself, but the unreasonableness of imposing upon the military such a continuing duty, which Congress might be deemed not to have intended to impose. *But cf. Schwartz v. United States*, 230 F. Supp. 536 (E.D. Pa. 1964), where an affirmative duty to seek out and warn was found to have *arisen* after discharge.

The fourth claim—affirmatively tendering Henning misleading medical advice on discharge—is the claim which petitioner contends that the Court below decided inconsistently with *United States v. Brown*, supra. It is probable, as the Court of Appeals "assumed" (Opinion below, p. 8), that this affirmative negligent act would not have occurred had the x-ray not been misread. But *Brown* expressly rejected the "but for" interpretation of *Feres* which the dissenting Justices in *Brown* would have applied. *Brown* holds that if a negligent act occurs after discharge, the fact that this negligent act would not have occurred had the claimant not suffered an in-service injury is not material. See 348 U.S. at 112. *Accord, Schwartz v. United States*, supra.

What *is* material is not whether "the delivery of the certificate . . . may be assumed to have arisen from the negligent readings of the x-rays" (Opinion below, p. 8), but whether allowing this claim for post-service interference with proper diagnosis and treatment caused by that certificate—allowing that it may have "arisen" from the misreading of the x-rays—would disrupt "the peculiar and special relationship of the soldier to his superiors. . . ." See *United States v. Brown*, supra, 348 U.S. at 112. To hold, as did the Court of Appeals, that the "reliance on the discharge certificate" claim is barred because of the apparent "but for" relationship between the certificate and the in-

service x-ray (see Opinion below, p. 8), is to apply the dissenting instead of the majority opinion in *Brown*. Further, it compels the unwarranted presumption that had the old army injury in *Brown* had a negligent origin, recovery for the subsequent separate negligence would have been denied because the latter negligence "arose" from the former.

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the judgment and opinion of the Third Circuit.

Respectfully submitted,

JEROME R. VERLIN
Suite 700
121 South Broad Street
Philadelphia, Pennsylvania 19107
Counsel for Petitioner

October 6, 1971

APPENDIX

Opinion and Judgments of the Court of Appeals

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 19,088

RALPH J. HENNING, *Appellant*

v.

UNITED STATES OF AMERICA

(D.C. Civil Action No. 38905)

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Argued March 18, 1971

Before BIGGS and KALODNER, *Circuit Judges*
and WHIPPLE, *District Judge*

OPINION OF THE COURT

(Filed July 13, 1971)

BIGGS, *Circuit Judge*.

Appellant, Henning brought this suit under the Federal Tort Claims Act, 28 U.S.C. §§1346(b), 2671 et seq. to recover damages for:

"(a) causing the plaintiff to contract the disease of tuberculosis;

"(b) failing to discover that plaintiff had contracted the disease of tuberculosis both before and after discharge;

"(c) failing to properly administer x-rays both before and after discharge;
"(d) failing to maintain testing equipment in proper condition both before and after discharge;
"(e) failing to properly analyze the x-rays both before and after discharge;
"(f) failing to select competent personnel both before and after discharge;
"(g) failing to warn the plaintiff of a known danger both before and after discharge;
"(h) failing to treat the plaintiff before and after discharge;
"(i) failing to properly treat the plaintiff both before and after discharge;
"(j) being otherwise guilty of negligence, gross negligence, carelessness, recklessness, and/or wilful and wanton misconduct both before and after discharge." See Appellant's Complaint appearing in Appellant's Appendix at 5a-6a.

The parties' stipulation of facts and Henning's affidavit reveal that Henning's lungs and chest were normal when he was inducted into the United States Army on October 10, 1961, and this point is not contested, but that x-rays taken of Henning's chest at the Seneca Army Depot on October 7, 1963 showed that he had a "moderately advanced active tuberculosis in the right upper lobe." The report of his lungs on these x-rays, prepared by an Army doctor, "failed to indicate the presence of the tubercular condition" and Henning was never informed by the Army of his true condition either during his tenure as a serviceman or after his discharge. On November 14, 1963, Henning was discharged from military service. Shortly thereafter, but before Henning left the Seneca base, he was requested to go to the infirmary for a blood test. After waiting at the infirmary for approximately one hour without any tests being performed on him, he was

instructed to leave. Either before or after his discharge or contemporaneously therewith,[1] Henning was issued a certificate dated November 6, 1963 indicating that on November 14, 1963 his condition was such that he was considered physically qualified for separation or for re-enlistment without re-examination if re-enlistment were to take place within 180 days of discharge.

In June, 1964, after experiencing a severe cough, a loss in weight, a decrease in appetite, and pains on his left side, Henning visited a physician who informed him of his tubercular condition. He was subsequently admitted to Riddle Memorial Hospital in Media, Pennsylvania where he was told that his disability was service-connected and that he would be kept in that hospital only until he had been admitted to a Veterans Administration (V.A.) Hospital. On June 23, 1964, Henning's wife filled out an application for Henning's admission to a V.A. Hospital. After several unsuccessful attempts to gain admission, Henning, through the efforts of Dr. Harold Israel, became a patient at a V.A. Hospital in Baltimore, Maryland.

On April 20, 1970, the District Court granted partial summary judgment against Henning "[a]s to all that occurred while plaintiff was in the United States Army—the misreading of the x-ray and the consequent aggravation of his tubercular condition. . . ." This order also granted Henning the opportunity to amend his pleadings with respect to his claim of "negligence in connection with the care and treatment . . ." received from the V.A. On May 11, 1970 the District Court amended its previous order so as to render that judgment final for purposes of Rule 54(b), Fed. R. Civ. Proc., 28 U.S.C.[2]

---

1. This point is not clear from the record.

2. Rule 54(b) states in relevant part: "When more than one claim for relief is presented in an action . . . the court may direct the entry of a final judgment upon one or more but less than all of the claims only upon an express determination that there is no just reason for delay and upon an express direction for the entry

In *Feres v. United States*, 340 U.S. 135, 146 (1959), the Supreme Court engrafted an exception to the Federal Tort Claims Act and held "that the Government is not liable for . . . injuries to servicemen where the injuries arise out of or are in the course of activity incident to service."[3] The *Feres* doctrine was reaffirmed by the Supreme Court in a 1963 decision, *United States v. Muniz*, 374 U.S. 150, 159. Also, see *Dilworth v. United States*, 387 F.2d 590 (3 Cir. 1967); *Bailey v. De Quevedo*, 375 F.2d 72 (3 Cir. 1967), cert. denied, 389 U.S. 923 (1967). The issue presented for our determination is whether the claim or claims upon which the District Court granted summary judgment are for injuries arising out of or in the course of activity incident to military service.

Before determining this question, it is necessary to state the various claims upon which the District Court granted summary judgment. From the pleadings, affidavits, motions, and briefs, we can discern four separate claims which were disposed of by the District Court's partial summary judgment. One claim is for the negligence of the Army doctor in misreading the x-ray taken of Henning on October 10, 1961. Another claim is for failing to advise Henning of his tubercular condition before discharge. A third claim is for failing to advise Henning of his condition after discharge.[4] A fourth claim is for issuing Henning a certificate indicating that his physical condition was such on November 14, 1963 that

---

of judgment." In its amended order of May 11, 1970, the District Court made the requisite determination that there is no just reason for delay. Consequently, this court has jurisdiction under 28 U.S.C. §1291.

3. See generally 35 Am. Jr. 2d, Federal Tort Claims Act §75, at 351-52; Serviceman's Right to Recover Under the Federal Tort Claims Act, 64 A.L.R. 2d 679.

4. Included in this claim is the contention that the Army was negligent in not advising Henning of his condition when he reported to the infirmary for a blood test shortly after being discharged on November 14, 1963.

he was considered physically qualified for separation or for re-enlistment within 180 days without re-examination.

Applying the *Feres* doctrine to the first claim, we have concluded that Henning cannot recover for the negligence of the Army doctor in misreading the x-ray. The injury caused by such misreading clearly arises out of activity incident to his military service. Henning, however, argues that the critical time under *Feres* is when the injury occurs and that his injury occurred after he was discharged. This argument is erroneous for *Feres* does not limit its holding to injuries occurring in the course of activity incident to service. It also immunizes the Government for injuries arising out of activity incident to service. We think that *Feres* focuses not upon when the injury occurs or when the claim becomes actionable, but rather the time of, and the circumstances surrounding the negligent act. This view is supported by *United States v. Brown*, 348 U.S. 110 (1954), where the Supreme Court held that a discharged veteran may maintain an action against the United States for an injury suffered in a V.A. Hospital after his discharge as a result of negligent treatment of a service-connected disability. The Court allowed recovery "[s]ince the negligent act giving rise to the injury . . . was not incident to the military service . . ." 348 U.S. at 113. The focus is thus upon when and how the negligent act occurs.

Even if we accepted Henning's contention that the critical date under *Feres* is when the injury occurs, this would not aid Henning's case for we conclude that there is no question but that tuberculosis, being the type of disease which ordinarily grows progressively worse without treatment, rendered the negligence of the officer examining the x-rays progressively operable until a permanent arrest of the disease be effected. Thus, we take judicial notice of the fact that part of Henning's injury with respect to the first claim occurred when Henning was still in the service.

We think that the second claim is also foreclosed by

the *Feres* doctrine for, once again, the negligent act, failing to advise Henning of his condition before discharge, occurred while Henning was in the service. While this negligent act occurred shortly before his discharge, Henning was nonetheless on active duty at this time. The *Feres* decision is not predicated upon the length of time remaining before a serviceman is separated but rather upon his military status at the time of the negligent act. Compare *Knoch v. United States*, 316 F.2d 532 (9 Cir. 1963).

The third claim, as we have said, is based on the failure of the medical authorities at the Seneca Army Depot to advise Henning of his tubercular condition after his discharge. Did or did not the District Court err in granting summary judgment in favor of the United States on this claim? That there was a failure to so inform Henning is indubitable. Henning's theory is that this failure was a negligent "act" occurring after Henning's discharge and that this brings his claim within the holding of *United States v. Brown*, *supra*. In *Brown*, as stated above, the Supreme Court held that a discharged veteran could maintain an action against the United States for an injury suffered in a V.A. Hospital *after* his discharge as a result of negligent treatment of his service-connected disability. Brown had incurred a knee injury while on active duty in the Armed Forces and the injury led to his honorable discharge in 1944. In 1950 the Veterans Administration performed an operation on the knee but it continued to dislocate frequently. "So," as Mr. Justice Douglas stated, "another operation was performed by the Veterans Administration in 1951" and during the course of this operation "an allegedly defective tourniquet was used, as a result of which the nerves in . . . [Brown's] leg were seriously and permanently injured." Mr. Justice Douglas went on to say: "The District Court agreed with the contention of petitioner that respondent's sole relief was under the Veterans Act and dismissed his complaint under the Tort Claims Act. The Court of Appeals reversed. 209

F.2d 463. The case is here on a petition for certiorari which we granted, 347 U.S. 951, because of doubts as to whether *Brooks v. United States*, 337 U.S. 49, or *Feres v. United States*, 340 U.S. 135, controlled this case.

"The *Brooks* case held that servicemen were covered by the Tort Claims Act where the injury was not incident to or caused by their military service. 337 U.S. 49, 52. In that case, servicemen on leave were negligently injured on a public highway by a government employee driving a truck of the United States. The fact that compensation was sought and paid under the Veterans Act was held not to bar recovery under the Tort Claims Act. We refused to 'pronounce a doctrine of election of remedies when Congress has not done so.' Id., at 53." (Star footnote omitted.) 348 U.S. at 111. Brown was permitted to recover under the Federal Tort Claims Act.

In *Schwartz v. United States*, 230 F. Supp. 536 (E.D. Pa. 1964), an action was brought by an ex-serviceman under the Federal Tort Claims Act predicated upon negligence in the Army's failure to take reasonable steps to inform the plaintiff that a dangerous drug (umbrathor) had been injected into his sinuses while he was in the service. The dangerous qualities of the drug did not become apparent until after the plaintiff had been discharged. The court held that there was a duty resting on the Government to follow up these cases in which the drug had been used: "The negligence here is not in its installation, but rather in not having affirmatively sought out those who had been endangered after there was knowledge of the danger in order to warn them that in the supposedly innocent treatment there had now been found to lurk the risk of devastating injury." 239 F. Supp. at 540.

We deem Henning's third claim to be insupportable. While it cannot be disputed on the present record that Henning's tubercular condition grew steadily worse after the negligence of the Seneca authorities properly to read his X-rays prior to his discharge, that failure occurred but once and Henning's disaster is due to that failure. To

support Henning's claim we would have to treat the Seneca medical authorities' failure as a continuous one terminating only in June 1964 when Henning was informed of his tubercular condition. This seems beyond the contemplation of the Federal Tort Claims Act as interpreted by *Feres*. In each of the cases cited above a claim resulted from a tort occurring after termination from service. The *Brown* case does not aid Henning's position for the Supreme Court's interpretation of the Act in that case was based on an event not incident to or caused by Brown's military service, a situation plainly distinguishable from that in the case at bar.

In respect to the fourth claim of negligence, issuing Henning the certificate attesting to his good health on November 14, 1963, neither the stipulation of facts nor Henning's deposition introduced in evidence, nor anything else in the record, discloses just when the certificate of good health was given to Henning but it would appear that it was either at the actual time of his discharge or within a brief period thereafter and the delivery of the certificate, in the absence of proof to the contrary by Henning, may be assumed to have arisen from the negligent reading of the X-rays. If the foregoing be a correct interpretation of the facts and the law, the delivery of the certificate falls within the *Feres* doctrine and Henning may not recover on his fourth claim.

The judgment will be affirmed.

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit.

Opinion and Order of the United States District Court

The parties to this civil action, alleged to arise under 28 U.S.C.A., § 1346(b) and § 2671, et seq., have stipulated to the "pertinent facts" of the case. Before the Court are the parties competing motions for summary judgment under Rule 56 Federal Rules of Civil Procedure.

The stipulation of facts reveals that on or about October 7, 1963, plaintiff while in the military service of the United States Army had x-rays taken of his chest and lungs at the Seneca Army Depot. The x-rays revealed "moderately advanced active tuberculosis in the right upper lobe." (Stipulation ¶ 10). Unfortunately, the report of the x-rays prepared by the army doctor "failed to indicate the presence of the tubercular condition." (Stipulation, ¶ 11). On November 14, 1963, plaintiff was separated from the Army and "the discharge procedure was completed." (Stipulation ¶ 12). Plaintiff was not told that he had tuberculosis and in fact "was issued a certificate indicating . . . that he was considered physically qualified for separation or for re-enlistment without re-examination." (Stipulation ¶ 15).

Plaintiff was admitted to a V.A. Hospital in September of 1964 and in October of that year he had to undergo a "major" tuberculosis operation—a pulmonary decortication left. He seeks to recover damages growing out of this unfortunate sequence of events from the United States government under the Federal Tort Claims Act. In addition, plaintiff has alleged negligence on the part of the Veterans Administration in connection with the care and treatment he received.

Plaintiff 's road to recovery of damages from the Government is blocked by an impassable barrier—the doctrine of *Feres v. United States*, 340 U.S. 135, 71 S. Ct. 153 (1950) —and I must grant the Government partial summary judgment as to all that happened while plaintiff was in the United States Army. His was an in-service, and not a post-

service injury, and for the misreading of the x-ray by an Army physician and the consequent aggravation of a tubercular condition there can be no recovery under the Federal Tort Claims Act. "We conclude that the Government is not liable under the Federal Tort Claims Act for injuries to servicemen *where the injuries arise out of or are in the course of activity incident to service.*" *Feres v. United States, supra*, at p. 159. (Emphasis added.) This is our case. The instant case is indistinguishable at law from *Feres* which is controlling.

Plaintiff's reliance on *United States v. Reid*, 251 F.2d 691 (CCA 5, 1958), though skillfully advanced, is misplaced. *Reid* does not negative the controlling force of *Feres* for at least two reasons: First, the plaintiff in *Reid* was a federal civilian employee in an Army Hospital and not a soldier; second, the issue in *Reid* was: when does a claim accrue for purposes of satisfying the statute of limitations? The issue before me—and decided in *Feres*—is otherwise. There is here no question of when a claim accrues; rather the question is: Is the claim one for which the Government can be found liable under the Federal Tort Claims Act? The settled answer, as I have indicated, is No.

As for plaintiff's claim of negligence on the part of the Veterans Administration in connection with care and treatment, I shall grant plaintiff the full right to amend his pleadings on this issue. As to this issue alone the matter can now proceed to trial.

ORDER

AND NOW, this 20th day of April, 1970, it is hereby ORDERED that:

(1) As to all that occurred while plaintiff was in the United States Army—the misreading of the x-ray and the consequent aggravation of his tubercular condition—summary judgment on behalf of the United States of America and against plaintiff is GRANTED.

(2) As to any alleged negligence in connection with the care and treatment plaintiff received from the Veterans Administration, plaintiff is GRANTED twenty (20) days to amend his pleadings in conformance with this memorandum. Upon his failure to do so, the complaint will be dismissed.

BY THE COURT:

/s/ A. LEON HIGGINBOTHAM, J.

Amended Order
of the United States District Court

AND NOW, this 11th day of May, 1970, paragraph one of the Order entered April 20, 1970, is hereby amended to read as follows:

> (1) There being no just reason for delay, summary judgment on behalf of the United States of America and against plaintiff is GRANTED as to all that occurred while plaintiff was in the United States Army—the misreading of the x-ray and consequent aggravation of his tubercular condition.

In all other respects, the said Order of April 20, 1970, is unchanged.

BY THE COURT:

/s/ A. LEON HIGGINBOTHAM, J.